



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2004

Mr. Jeremy P. Levine
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OR2004-10689

Dear Mr. Levine:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213871.

The Capital Metropolitan Transit Authority ("Capital Metro"), which you represent, received a request for "[a]ll documents, communications, correspondence, notes, email, calendars, memoranda, recordings, and other information" generated after January 1, 2002 related to two business entities. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.111, and 552.131 of the Government Code. We have also reviewed arguments and documents submitted by the following consultants: The Aegis Group ("Aegis"); Atrium Real Estate Services ("Atrium"); Paul Hornsby & Company ("Hornsby"); Lopez-Phelps & Associates ("Lopez"); Martinez, Wright & Mendez ("Martinez"); and Spitzer & Associates ("Spitzer").¹ We have considered all claimed exceptions and reviewed the submitted representative sample of information.²

¹You inform us that these documents and arguments are being submitted on behalf of Capital Metro. You also state that Capital Metro has a right of access to these documents and that Capital Metro considers these documents to be responsive to the present request.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that the brief submitted by Martinez describes the records in its possession as including: "Roadway construction document plans and specifications, engineering reports, schedules, permit applications, and associated files;" "[s]ite plan permit applications, sketches, plans, and associated files;" and "[m]eeting minutes." The only information submitted by Martinez consists of a "New Storm Sewer Layout" and a "Site Plan." As we have not received any records representative of any other types of information, we assume such information has been released to the extent that it existed on the date Capital Metro received this request. If any such records have not been released, they must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We also note that portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

....

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17) (emphasis added). The submitted information includes completed reports made for Capital Metro that are expressly public under section 552.022(a)(1) unless excepted under section 552.108 or confidential under other law. Section 552.108 is not claimed in this instance. Instead, it is asserted that this information is excepted under sections 552.101, 552.105, and 552.131(b).³ Sections 552.105 and 552.131(b) of the Government Code are discretionary exceptions that protect a governmental body's interest and may be waived. As such, sections 552.105 and 552.131(b) do not constitute other law making information confidential for purposes of section 552.022.⁴

³Because it is not asserted that any of the information at issue constitutes the trade secret or commercial or financial information of a third party, we understand section 552.131(a) not to be at issue here.

⁴ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general).

Therefore, the completed reports may not be withheld under section 552.105 or section 552.131(b). However, this office has determined that sections 552.101 constitutes other law for purposes of section 552.022(a). Thus, we will consider whether section 552.101 applies to these reports.

In addition, the information submitted by Capital Metro in Attachment "C" contains court-filed documents. Information filed with a court is generally a matter of public record and may not be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Capital Metro asserts this information may be withheld under sections 552.103, 552.107, and 552.131(b), as well as the attorney-client and work product privileges. Sections 552.103, 552.107, and 552.131(b) are all discretionary exceptions that protect a governmental body's interests and may be waived; as such, they are not other law that makes information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4 (1994) (governmental body may waive 552.107); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the court-filed documents, which we have marked, may not be withheld pursuant to these exceptions. However, the Texas Supreme Court has held that the "Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We will therefore consider whether any of the information at issue is protected under the rules.

However, we first address the arguments that the information not subject to section 552.022 is excepted under section 552.131 of the Government Code, which is the broadest of the exceptions claimed. Section 552.131 excepts from public disclosure certain types of information relating to a business prospect that a governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. *See* Gov't Code § 552.131. In this instance, it has not been established that any of the information at issue relates to a business prospect that Capital Metro seeks to have locate, stay, or expand in or near its territory. Therefore, we find that none of the information at issue is excepted from disclosure under section 552.131 of the Government Code, and none of it may be withheld on that basis.

Capital Metro also asserts that the information submitted as Attachments "C," "D," and "E" is excepted from public disclosure under section 552.103. This section provides in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Capital Metro has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Capital Metro must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

Capital Metro tells us that it acquired certain real property by way of a condemnation action and that the tenant at the time of the acquisition has filed suit against the previous owner due to "circumstances surrounding Capital Metro's condemnation of the Property." Capital Metro argues that it "may become part of above-described litigation in some way, shape, or form." (Emphasis in original.) However, Capital Metro does not inform us that it intends

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

to intervene in the pending litigation, nor does it provide any concrete evidence that its anticipated involvement in the pending suit is more than mere conjecture. We therefore conclude that none of the submitted information may be withheld pursuant to section 552.103.

We next address the more discrete exceptions raised by Capital Metro and its consultants. It is asserted that some of the submitted information that is not subject to section 552.022 is excepted from public disclosure under section 552.105 of the Government Code because it relates to the acquisition of real property for use by Capital Metro as part of the North Operations Facility Project (the "project"). Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" See ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. See Open Records Decision No. 564 (1990).

Capital Metro states that the submitted documents "are related to the location or price of real property for Capital Metro's stated public purpose of constructing a north Austin bus maintenance facility." You indicate that the acquisition of property is ongoing and that release of the release of the submitted information would impair Capital Metro's planning and negotiation position in regard to the ongoing transaction. Based on our review of your arguments and the submitted information, we find that section 552.105 is applicable in this instance. Accordingly, we conclude that the information we have marked may be withheld pursuant to section 552.105 of the Government Code.⁶

⁶As our ruling on section 552.105 is dispositive, we need not consider the remaining arguments that are made for withholding this information.

We next address the claim that some of the submitted information is confidential. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information that is confidential under other statutes. The consultants claim that their information is confidential under “the Uniform Standards of Professional Appraisal Practice, as cited in the Texas Appraisers Licensing and Certification Act.” However, our attention has not been directed to any particular provision under which any of the submitted information is deemed confidential for purposes of section 552.101, nor are we aware of any such provision. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). We therefore conclude that no portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

We next address Capital Metro’s assertion that the information submitted as Attachment “C” is excepted from disclosure pursuant to the attorney-client privilege. We begin by addressing whether Rule 503 of the Texas Rules of Evidence protects the information in Attachment “C” that is subject to section 552.022. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of

the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, you have not identified any of the parties to the communications that you seek to withhold. However, having reviewed the documents at issue, we have been able to discern that certain individuals are privileged parties, but we are unable to discern whether the remaining individuals are privileged parties. Instead, we note that the documents indicate that some of these individuals opposed Capital Metro in these matters. *See generally* Tex. R. Evid. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of *common interest*”) (emphasis added); *see also In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1998, no pet.) (discussing the “joint-defense” privilege incorporated by Rule 503(b)(1)(C)). Accordingly, only the information we have marked may be withheld pursuant to Rule 503. *See Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).⁷

We will now address your arguments under the attorney-client privilege for the information that is not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*.

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel,

⁷Because of our ruling on this issue, we need not consider whether the submitted information is protected under Rule 192.5.

such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Having considered your arguments and reviewed the submitted information, we agree that some of the submitted information that is not subject to section 552.022 may be withheld under section 552.107. However, as noted above, some of these communications are among individuals who have not been established as privileged parties. Such communications may not be withheld under section 552.107. We have marked the submitted documents accordingly.

You also contend that information in Attachment “C” may be withheld as attorney-work product. However, as noted above, the remaining information in this attachment was communicated to individuals who have not been established to be privileged parties. As you have not demonstrated that these records were maintained as privileged, we find that none of this information may be withheld on the basis of the attorney work product privilege. See Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be waived).

Finally, we address your arguments that the information in Attachment “E” is protected by the deliberative process privilege incorporated by section 552.111 of the Government Code.⁸ In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v.*

⁸We note that several of the documents in Attachment “E” appear to be duplicates of documents contained in other attachments. We do not address your arguments under section 552.11 to the extent it pertains to information that we have found to be otherwise excepted from disclosure.

Gilbreath, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. See Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. See *id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. See *id.* at 2.

Having considered your arguments and representations and having reviewed the information you seek to withhold in Attachment "E", we find that a portion of the information at issue constitutes deliberations regarding Capital Metro's policymaking functions that may be withheld under section 552.111 of the Government Code. We find, however, that the remaining information at issue does not constitute advice, recommendations, opinions, or other material reflecting Capital Metro's policymaking processes, and it may not be withheld on that basis. We have marked the information that Capital Metro may withhold pursuant to this exception.

In summary, we have marked the information that Capital Metro may withhold under section 552.105. Capital Metro may also withhold the information that we have marked in Attachment "C" as coming within the attorney-client privilege found in Rule 503 and section 552.107. We have also marked the information in Attachment "E" that may be

withheld under section 552.111. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 213871

Enc. Submitted documents

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